A

Deutz Asia-Pacific (Pte) Ltd v Champ Parts & Equipment Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–670 OF 1998
MOHD HISHAMUDIN J
11 MARCH 2002

B

Civil Procedure *— Jurisdiction — Arbitration clause — Distributor agreement governed by laws of Singapore and to be settled by way of arbitration — Unconditional memorandum of appearance filed by defendant — Whether defendant precluded from relying on their rights under foreign law cum arbitration clause*

C

Pursuant to an agreement between the parties, the defendant was to distribute goods supplied by the plaintiff. It was stipulated that payment by the defendant to the plaintiff may be made by way of bills of exchange. The plaintiff alleged that the defendant, having been supplied with goods, did not honour certain bills of exchange. The defendant denied owing the plaintiff any money. Instead, it was

D

alleged that the plaintiff owed the defendant money for not taking back certain goods and for various warranty repairs and/or replacement of parts undertaken by the defendant. The plaintiff took the stand that the defendant's allegations were irrelevant as the dispute was governed by the Bills of Exchange Act 1949. Consequently, the plaintiff applied for and obtained summary

E

judgment. This was the defendant's appeal. In the statement of defence and the affidavit opposing the application for summary judgment, the defendant contended that the dispute was governed by the agreement. Therefore, the defendant claimed that pursuant to cl 18, the agreement was governed by the laws of the Republic of

F

Singapore and the dispute was to be settled by arbitration in accordance with the Rules of Reconciliation and Arbitration of the International Chamber of Commerce. The plaintiff countered that even if the dispute was governed by the agreement, cl 18 was irrelevant as the defendant had waived its right to rely on cl 18 by filing an unconditional appearance.

G

Held, allowing the appeal with costs:

(1) The contention of the defendant that the dispute was governed by the agreement cannot be summarily dismissed but must be accepted because of the following reasons: (i) there was an

H

agreement in existence between the parties; (ii) the statement of claim relied substantially on the agreement; (iii) the affidavit in support of the application for summary judgment also relied substantially on the agreement; (iv) the statement of claim did not contain any averment that the claim by the plaintiff against the defendant was made purely on the basis of the bills of exchange or

I

that it was made solely pursuant to the Bills of Exchange Act 1949; and (v) although the alleged payments due to the plaintiff by the defendant were by way of bills of exchange, the payments

were not for transactions unconnected with the agreement but for goods sold pursuant to the agreement (see pp 34B–35B). A

(2) There is merit in the defence that the dispute ought to be adjudicated upon by applying the substantive laws of the Republic of Singapore and by way of arbitration in accordance with the Rules of Reconciliation and Arbitration of the International Chamber of Commerce (see p 36C); *American Express International Banking Corporation v Tan Loon Swan* [1992] 1 MLJ 727, *Ng Lai Tien v Peregrine Finance Ltd* [1995] 4 MLJ 7 and *Forsythe International Ltd v The Owners of the Ship or Vessel 'Avro Venture'* [1998] 2 CLJ 583 distinguished. B

(3) Where a defendant proposes to rely on a provision such as cl 18 as a defence to the plaintiff's claim under the agreement, the filing of an unconditional appearance with a view to striking out the writ by reason of such a clause should only be an option open to the defendant. Such a course of action should not be mandatory. A defendant intending to raise such a defence should be allowed the alternative course of filing an unconditional appearance and thereafter to plead the foreign law cum arbitration clause as a defence in the statement of defence and in the affidavit opposing the application for summary judgment (see p 36G–H). C D

(4) By entering an unconditional appearance and pleading the foreign law cum arbitration clause, the defendant is not in anyway implying — and cannot be taken to have so implied — that it is abandoning the right to have the dispute with the plaintiff settled by way of arbitration in accordance with the laws of Singapore. By filing the unconditional appearance the defendant is submitting to the jurisdiction of the court — but not in the absolute sense. By so submitting, the defendant wants the court to hear the parties and determine whether the defendant can rely on its rights under the foreign law cum arbitration clause. The court must hear and determine the issue and not shut the defendant out merely because the defendant had filed an unconditional appearance instead of a conditional appearance (see p 37A–C). E F G

[Bahasa Malaysia summary

Selaras dengan satu perjanjian antara pihak-pihak tersebut, defendan adalah dikehendaki mengedarkan barangan yang dibekalkan oleh plaintif. Adalah ditetapkan bahawa pembayaran oleh defendan kepada plaintif boleh dibuat melalui bil-bil penukaran. Plaintif mendakwa bahawa defendan, setelah dibekalkan dengan barangan, tidak melunaskan bil-bil penukaran yang tertentu. Defendan menafikan terhutang sebarang wang kepada plaintif. Sebaliknya, telah didakwa bahawa plaintif terhutang wang kepada defendan kerana tidak mengambil balik barangan yang tertentu untuk pelbagai pembaikan warranti dan/atau penggantian alatganti yang diakujanji oleh defendan. H I

Plaintif berpendirian bahawa dakwaan-dakwaan defendan adalah tidak relevan kepada pertikaian tersebut dikuasai oleh Akta Bil Pertukaran 1949. Akibatnya, plaintif telah memohon untuk mendapatkan dan telah memperolehi penghakiman terus. Ini adalah rayuan defendan. Di dalam pernyataan pembelaan dan afidavit yang membantah permohonan untuk penghakiman terus, defendan menegaskan bahawa pertikaian tersebut telah dikuasai oleh perjanjian tersebut. Oleh itu, defendan menuntut bahawa selaras dengan fasal 18, perjanjian tersebut telah dikuasai oleh undang-undang Republik Singapura dan pertikaian tersebut hendaklah diselesaikan melalui timbangtara menurut Rules of Reconciliation and Arbitration of the International Chamber of Commerce. Plaintif membantah bahawa meskipun pertikaian tersebut dikuasai oleh perjanjian tersebut, fasal 18 adalah tidak relevan kerana defendan telah mengenepikan haknya untuk bergantung pada fasal 18 dengan memfailkan satu kehadiran bersyarat.

Diputuskan, membenarkan rayuan tersebut:

(1) Penegasan defendan bahawa pertikaian tersebut telah dikuasai oleh perjanjian tidak boleh ditolak secara terus tetapi mestilah diterima kerana alasan-alasan yang berikut: (i) terdapatnya satu perjanjian yang wujud antara pihak-pihak tersebut; (ii) pernyataan tuntutan tersebut bergantung secara substansialnya pada perjanjian tersebut; (iii) afidavit yang menyokong permohonan untuk penghakiman terus juga bergantung secara substansialnya ke atas perjanjian tersebut; (iv) pernyataan tuntutan tersebut tidak mengandungi sebarang penegasan bahawa tuntutan oleh plaintif terhadap defendan telah dibuat semata-mata atas dasar bil-bil pertukaran atau ianya telah dibuat semata-mata selaras dengan Akta Bil-Bil Pertukaran 1949; dan (v) meskipun pembayaran-pembayaran yang dikatakan kena dibayar kepada plaintif oleh defendan adalah melalui bil-bil pertukaran, pembayaran-pembayaran bukannya untuk transaksi yang tiada kaitan dengan perjanjian tersebut tetapi untuk barangan yang telah dijual selaras dengan perjanjian tersebut (lihat ms 34B–35B).

(2) Terdapatnya merit di dalam pembelaan tersebut bahawa pertikaian itu haruslah diadjudikasikan dengan memakai undang-undang substantif Republik Singapura dan melalui timbangtara menurut Rules of Reconciliation and Arbitration of the International Chamber of Commerce (lihat ms 36C); *American Express International Banking Corporation v Tan Loon Swan* [1992] 1 MLJ 727, *Ng Lai Tien v Peregrine Finance Ltd* [1995] 4 MLJ 7 and *Forsythe International Ltd v The Owners of the Ship or Vessel 'Avro Venture'* [1998] 2 CLJ 583 dibeza.

(3) Di mana defendan bercadang untuk bergantung pada peruntukan seperti fasal 18 sebagai pembelaan kepada tuntutan plaintif di bawah perjanjian tersebut, pemfailan sesuatu kehadiran bersyarat

dengan harapan untuk membatalkan writ disebabkan oleh fasal yang sedemikian akan hanya merupakan opsyen yang terbuka kepada defendan. Jalan tindakan yang sedemikian tidak seharusnya menjadi mandatori. Defendan yang berniat untuk membangkitkan pembelaan yang sedemikian seharusnya dibenarkan menggunakan jalan alternatif bagi memfailkan kehadiran tanpa bersyarat dan selepas itu merayu undang-undang asing bersama fasal timbangtara sebagai pembelaan di dalam pernyataan pembelaan dan di dalam afidavit yang menentangkan permohonan untuk penghakiman terus (lihat ms 36G–H).

(4) Dengan memasukkan kehadiran tanpa bersyarat dan merayu undang-undang asing bersama fasal timbangtara, telah tidak dalam apa cara pun membayangkan — dan tidak boleh dianggap sebagai telah membayangkan sedemikian — bahawa ianya melepaskan hak untuk menyelesaikan pertikaian dengan plaintif melalui timbangtara menurut undang-undang Singapura. Dengan memfailkan kehadiran tanpa bersyarat defendan berhujah kepada bidang kuasa mahkamah — tetapi tidak secara mutlak. Dengan berhujah sedemikian, defendan mahu mahkamah mendengar pihak-pihak tersebut dan menentukan sama ada defendan boleh bergantung pada haknya di bawah undang-undang asing bersama fasal timbangtara. Mahkamah mestilah mendengar dan menentukan isu dan bukan tidak mempedulikan defendan hanya kerana defendan telah memfailkan satu kehadiran tanpa bersyarat dan bukannya kehadiran bersyarat (lihat ms 37A–C).]

Notes

For cases on arbitration clause, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3637–3639.

Cases referred to

American Express International Banking Corporation v Tan Loon Swan [1992] 1 MLJ 727 (distd)

Forsythe International Ltd v The Owners of the Ship or Vessel 'Avro Venture' [1998] 2 CLJ 583 (distd)

Lin Securities (Pte) Ltd v Nonee & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party) [1989] 1 MLJ 321 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

Ng Lai Tien v Peregrine Finance Ltd [1995] 4 MLJ 7 (distd)

Legislation referred to

Bills of Exchange Act 1949
Contracts Act 1950
Rules of the High Court 1980 O 12 r 7, O 14

A *Yong Chee Kong* (*Zulkifli Mohammad* with him) (*Yong Chee Kong & Co*) for the appellant/defendant.

Mohd Izral Khairy (*Shearn Delamore & Co*) for the respondent/plaintiff.

Mohd Hishamudin J: This is an appeal by the appellant to the judge in chambers against the decision of the learned Senior Assistant Registrar, B High Court, Shah Alam, who had allowed the plaintiff's/respondent's application for summary judgment against the defendant/appellant pursuant to O 14 of the Rules of the High Court 1980 ('the RHC').

I have allowed the appeal with costs.

As a brief background, in September 1990, the plaintiff/respondent and C the defendant/appellant entered into an agreement known as the 'distributor agreement' ('the agreement'). The contract commenced on 1 January 1991. Under this agreement, it is provided, inter alia, that the plaintiff appointed the defendant as a general distributor for the plaintiff in respect of a product known as KHD DEUTZ Aircooled Engines together with the spare parts ('the goods') for West Malaysia. Pursuant to the terms and conditions of the D agreement, the plaintiff from time to time supplied the goods to the defendant. It is stipulated by the agreement that payment by the defendant to the plaintiff for the goods delivered by the plaintiff to the defendant may be made by way of bills of exchange. Accordingly, the defendant had been making payments to the plaintiff by way of bills of exchange.

E On 20 June 1997, the plaintiff terminated the agreement with effect from 1 January 1998.

The plaintiff alleges that the defendant, having been supplied with the goods, had defaulted on the bills of exchange by not honouring them when presented for payments.

F The defendant, in the statement of defence and in the affidavit opposing the application for summary judgment, on the other hand, denies owing the plaintiff any money. Instead, the defendant alleges that the plaintiff had agreed to take back from the defendant a certain quantity of engines and spare parts which had a total value of RM947,188 but had failed to do so. It is further alleged by the defendant that it is the plaintiff G instead who owed them money as the defendant had carried out various warranty repairs and/or replacement of parts on behalf of the plaintiff.

The plaintiff, however, denies the above claims by the defendant. The plaintiff further argues that, in any event, the defendant's allegations were irrelevant as the dispute is governed solely by the Bills of Exchange Act 1949 H and not by the agreement.

The defendant, however, argues that the dispute between the plaintiff and them is governed by the agreement.

The writ and statement of claim were filed by the plaintiff on 2 June 1998.

I The unconditional memorandum of appearance was filed by the defendant on 26 June 1998.

The statement of defence was filed by the defendant on 9 July 1998.

The application for summary judgment was filed by the plaintiff on 30 July 1998. A

I am of the view that the defendant/appellant has succeeded in proving to the court that there is a bona fide dispute as to the alleged debt and that the dispute between the plaintiff and the defendant is governed by the agreement. B

I shall explain why I hold as such.

I take the view that the contention by the defendant (that the dispute is governed by the agreement), as reflected in the statement of defence (see para 9) and the affidavit in opposition, cannot be summarily dismissed but must be accepted because of the following reasons. First, as has been pointed earlier, there is in existence between the parties an agreement known as the distributor agreement. Second, the statement of claim relies substantially on the agreement and this is borne out by paras 3, 4, 5 and 9 of the statement of claim. It is averred in these paragraphs as follows: C

> 3 By a distributorship agreement entered between the plaintiff and the defendant dated 12 September 1990 ('distributor agreement'), the defendant was appointed as a general distributor for the full range of KHD DEUTZ Aircooled Engines together with the spare parts for peninsular Malaysia. D
>
> 4 The following are, inter alia, the terms and conditions of the said distributor agreement: E
>
> (i) purchase price of the goods supplied by the plaintiff shall be paid according to payment terms that is to be agreed upon by the defendant and the plaintiff and in the case of cheques and bills of exchange, payment is deemed only when it is honoured;
>
> (ii) the contract commenced on 1 January 1991;
>
> (iii) in the event parties wish to terminate, six months notice must be given; F
>
> (iv) an exception to the notice requirement is when, among others, there is wilful or negligent breach by one party or there is protesting of bills of exchange and cheques because of payment difficulties, wherein termination may be effected without the six months notice;
>
> (v) in the event the plaintiff rightfully terminates the contract without notice, the plaintiff may refuse delivery of any unexecuted purchase orders and shall be entitled, but not obliged to take back any stock from the defendant; G
>
> (vi) interest at the rate of 12% pa is applicable on all sums outstanding.
>
> 5 Upon the terms and conditions of the said distributor agreement, the plaintiff supplied goods to the defendant with payment by way of bill of exchange. H
>
> ...
>
> 9 The plaintiff on 20 June 1997 terminated the distributor agreement pursuant to the terms of the agreement with effect from 1 January 1998. I

Third, like the statement of claim, the affidavit in support of the application for summary judgment also relies substantially on the agreement. Fourth,

A the statement of claim, despite setting out the details of several bills of exchange at para 6 thereof, does not contain any averment that the claim by the plaintiff against the defendant is made purely on the basis of the bills of exchange or that it is made solely pursuant to the Bills of Exchange Act 1949 (I am, of course, aware of para 8 of the statement of claim which makes specific reference to the Bills of Exchange Act 1949, but this B paragraph, however, relates only to the claim for interest). Fifth, although the alleged payments due to the plaintiff by the defendant were by way of bills of exchange, nevertheless, the payments were not for transactions unconnected with the agreement: the alleged outstanding payments were for goods sold by the plaintiff to the defendant pursuant to the agreement.

C Now, on the premise that the dispute between the parties is governed by the agreement, the following question arises: whether the dispute between the plaintiff and the defendant is governed by the laws of the Republic of Singapore and should be settled by way of arbitration in accordance with the Rules of Reconciliation and Arbitration of the International Chamber of Commerce.

D The position taken by the defendant is that, if the dispute between the parties is governed by the agreement, then cl 18 of the agreement applies. Clause 18 and its effect was pleaded in the statement of defence as well as in the affidavit in opposition. Clause 18 states:

> Applicable Law, Place of Performance, Jurisdiction, Jurisdiction and Venue
>
> E This contract shall be govern by substantive law of the Republic of Singapore.
>
> Place of performance shall be Singapore.
>
> All disputes arising from this contract shall be finally settled in accordance with the Rules of Reconciliation and Arbitration of the F International Chamber of Commerce by three (3) arbitrators appointed according to such rules.

This means that the agreement is governed by the law of the Republic of Singapore and that the dispute is to be settled by arbitration in accordance with the Rules of Reconciliation and Arbitration of the International G Chamber of Commerce. This means that Malaysian laws, such as the Contracts Act 1950 and the Malaysian Bill of Exchange Act 1949, do not apply. What would be applicable are the relevant laws of the Republic of Singapore that govern the contractual relationship of the parties (including the bills of exchange transactions) under the agreement.

And this means that this court has no jurisdiction to adjudicate over the H dispute. The dispute has to be adjudicated by way of arbitration.

It is contended by the defendant that, in the light of cl 18, this court cannot grant the plaintiff summary judgment. The defendant relies on *Lin Securities (Pte) Ltd v Nonee & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party)* [1989] 1 MLJ 321, where VC George J (as he then was) I said (at p 79):

> One such question is whether Singapore law applies. If it does then that alone provides sufficient cause to deny the plaintiffs summary judgment.

It is, however, argued by the plaintiff that even if the dispute were to be governed by the agreement, cl 18 is irrelevant; for, the defendant, by filing an unconditional appearance, have waived their rights to rely on cl 18. The plaintiff relies on:

(1) *American Express International Banking Corporation v Tan Loon Swan* [1992] 1 MLJ 727;

(2) *Ng Lai Tien v Peregrine Finance Ltd* [1995] 4 MLJ 7;

(3) *Forsythe International Ltd v The Owners of the Ship or Vessel 'Avro Venture'* [1998] 2 CLJ 583; and

In my judgment, in the light of cl 18, the pleadings, affidavits and submissions, there is merit in the defence that, as a matter of law, the dispute ought to be adjudicated upon by applying the substantive law of the Republic of Singapore and by way of arbitration in accordance with the Rules of Reconciliation and Arbitration of the International Chamber of Commerce. It is the principle that where the court is of the opinion that there is a fairly arguable defence, summary judgment should not be granted to the plaintiff. In the Supreme Court case of *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 Hashim Yeop Sani SCJ (as he then was) said at p 480:

> The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

Having scrutinized the pleadings and the affidavits, and having carefully considered the written submissions, I am not convinced that the case before me is very clear cut in favour of the plaintiff. I simply fail to see why the defendant, having duly pleaded cl 18 both in the statement of defence and in the affidavit in opposition, should thereafter be precluded from relying on such a clause just because they had entered a normal appearance instead of a conditional appearance. I think it is unjust to deprive the defendant of their right to rely on cl 18 on such a technical ground. In my opinion, where a defendant proposes to rely on such a provision as cl 18 in the contract, as a defence to the plaintiff's claim under the contract, the filing of an unconditional appearance with a view to striking out the writ by reason of such a clause should only be an option open to the defendant: such a course of action should not be mandatory. The defendant intending to raise such a defence should be allowed the alternative course of filing a normal appearance (that is to say an unconditional appearance) and thereafter to plead the foreign law cum arbitration clause as a defence in the statement of defence and in the affidavit in opposition to the application by the plaintiff for summary judgment. It would, however, appear that by filing an unconditional appearance the defendant is, in a sense, submitting to the jurisdiction of the court. But I fail to see any sound rationale for the proposition that, by such submission to the jurisdiction of the court, the

defendant forfeits or abandons his right to plead the foreign law cum arbitration clause in opposing an application for summary judgment, more so when such a defence is pleaded in the statement of defence. The defendant in the case before me by entering an unconditional appearance and pleading the foreign law cum arbitration clause is not in anyway implying — and cannot be taken to have so implied — that they are abandoning their right to have their dispute with the plaintiff settled by way of arbitration and accordance with the law of Singapore. By filing the unconditional appearance the defendant is submitting to the jurisdiction of this court — but not in the absolute sense. By so submitting the defendant wants the court to hear the parties and determine whether they can rely on their rights under the foreign law cum arbitration clause. And I think in all fairness the court, must hear and determine the issue and not shut the defendant out merely because they had filed an unconditional appearance instead of a conditional appearance. In my view, the necessity to file an unconditional appearance should only become an issue when a defendant wishes to make an application for any of the reliefs specified under O 12 r 7 of the RHC, for example, an application to set aside the writ. But that is not the case here. Filing an unconditional appearance should not be made a prerequisite in respect of a defendant wishing to oppose an application for summary judgment by pleading a foreign law cum arbitration clause in the statement of defence or in the affidavit in opposition to the application.

Now, coming to the cases relied by the plaintiff, in *American Express International Banking Corporation*, Gunn Chit Tuan SCJ (as he then was), delivering the judgment of the Supreme Court, said (at pp 731–732):

> The second preliminary objection was that the courts in this country do not have jurisdiction because it is stated in cl 21 of the general loan and collateral agreement that the said agreement is to be construed according to, and the rights of the parties are to be governed by, the laws of Singapore. Mr Anantham, in reply pointed out that the appeal before us was not concerned with the general loan and collateral agreement but with the guarantee signed by the defendant in which there is no clause to specify that it was to be construed according to the laws of Singapore. We, however, noted that after service of the writ of summons and statement of claim on the defendant, he took no steps to apply for leave to enter conditional appearance with a view to striking out the claim on the ground that the courts in this country have no jurisdiction. Instead the defendant, having entered appearance, filed his defence in 1986, which was amended in 1987 and reamended in 1988 (pp 18–22 of the appeal records). The defendant has clearly submitted to the jurisdiction of the courts in this country, and in any case, we see no reason why a court in this country where the defendant resides is not the forum conveniens, and even if it is necessary for a court in this country to form an opinion upon a point of foreign law, s 45 of the Evidence Act 1950 can be applied. The second preliminary objection by the defendant's counsel was therefore also overruled.

I have scrutinized the facts of the above three cases cited by the plaintiff and I am of the view that on the facts, they can be distinguished from the instant case. Unlike the instant case, in none of the cases relied upon was it expressly stated in the respective judgments that it was pleaded either in the

statement of defence or in the affidavit in opposition that the court has no jurisdiction to adjudicate on the dispute by reason of the foreign law and/or arbitration clause in the agreement entered into by the parties. The foreign law and/or arbitration issue appears to have been taken up merely by way of submission of counsel. Moreover, in *American Express International Banking Corporation*, unlike the case before me, adjudication by arbitration was not an issue; what was in issue was merely the application of foreign law; and it would appear that the issue of foreign law and jurisdiction was raised for the first time only when the case came before the Supreme Court, and even then it was merely by way of a preliminary objection. To my mind, this lateness in the raising of the issue and the manner it was raised must have largely influenced the Supreme Court in coming to its decision. *Forsythe International Ltd* did not concern an application for summary judgment; nor did it concern a provision in an agreement similar to cl 18.

In *Ng Lai Tien*, not only was there an absence of any averment regarding the application of foreign law and/or arbitration in the statement of defence, the affidavit opposing the application for summary judgment before the magistrate court was equally silent on the matter. And it would appear from the law report that the argument regarding foreign law and arbitration was raised for the first time only at the hearing of the appeal before the High Court Judge.

In the case before me, in view of the fact that the defendant has succeeded in satisfying the court that there are merits in the defence, the application for summary judgment by the plaintiff must be dismissed with costs. The matter must proceed to trial. The order of the learned senior assistant registrar must, accordingly, be set aside.

Appeal allowed with costs.

Reported by D Sivalingam